repay in San Augustine county. Lindheim v. Muschamp, 72 Tex. 83, 12 S. W. Rep. 125.

But the question now arises whether the ability to sue the company in San Augustine county would confer the right to sue there also the sureties, who all resided in Tarrant county. To so hold would be to hold that whenever, by an exception to the statute of venue, one defendant may be sued in a county, other defendants, who do not reside in the county, may be sued there also on account of another exception. Rev. St. art. 1198, reads: "No person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to wit." Then follow the exceptions. The fourth exception is: "Where there are two or more defendants residing in different counties, in which case the suit may be brought in any county where any one of the defendants resides;" and the twenty-first exception confers the right to sue a corporation in any county where it has an agency or a representative. It is sought to make an exception of the case of the sureties, because there is an exception in the case of the railroad company; but the sureties may be sued in San Augustine county only in the event that the railroad company has its domicile in San Augustine county, which is not shown to be the case. Hilliard v. Wilson, 76 Tex. 184, 13 S. W. Rep. 25. So we conclude that the sureties could not be sued in San Augustine county, although the railroad company could. The defendants' demurrers to the petition were properly overruled.

1. The alleged mistake in the wording of the bond was sufficiently averred so as to entitle the plaintiffs, on general demurrer, to have the correction made on the prayer for general relief.

2. The contract and its breach were fully set forth, and no demand for the repayment of the subscriptions was necessary before bringing suit.

3. It sufficiently appears from the allegations in the petition that the plaintiffs guarantied the subscriptions of themselves and others, and that they were trustees for the subscribers in becoming the obligees in the bond.

4. As trustees for themselves and other subscribers, it was not necessary to make the other representatives of S. W. Blount parties to the suit, because, where there are several trustees, those surviving can maintain a suit without making the representatives of a deceased trustee parties thereto.

5. Maintaining this suit as trustees for all the subscribers, plaintiffs were entitled to recover judgment for the entire amount subscribed and paid, including that subscribed and paid by S. W Blount.

Upon the trial, after the demurrers were overruled, the following facts were shown: (1) The bond sued on was put in evidence, and was as before set out in the statement of plaintiffs' petition. (2) S. W. Blount, Jr., testified that he and the other plaintiffs and S. W. Blount executed two written obligations to the defendant company, guarantying to it the payment of citizens' subscriptions to the construction of the railroad to the amount of $9,000, to be paid in three installments, one-third when the work commenced, one-third when the right of way was obtained through from the town of Nacogdoches to the town of San Augustine, and balance to be paid when 10 miles of the road was completed and in running order. These obligations were for $7,500 and $1,500 respectively. When the first was executed, defendant company executed a bond similar to the one sued on; and when the second obligation was executed, the bond sued on was executed in lieu of the first. The obligations executed by the plaintiffs were given to guaranty the payment of the various sums of money subscribed by the citizens to the amount of $9,000, and the last obligation was contemporaneous with the bond sued on. Witness was acting as manager for the citizens in the transaction. The terms of the obligations of citizens, as agreed upon, were that the citizens were to pay to the railroad company $9,000 in installments, and the railroad company were to give a bond that, if they did not build and equip the railroad from Nacogdoches to San Augustine within the time stipulated, the railroad company was to refund the money paid by the citizens. The citizens were to pay for right of way in San Augustine county, and to furnish depot grounds at the town of San Augustine. All the right of way had not been secured. Hollis collected the subscriptions from the citizens to the amount for which judgment was rendered, and the same was appropriated by the railroad company. We are of the opinion that plaintiffs proved a cause of action on the bond, and that they were entitled to maintain the same as trustees for the subscribers, and that there was no error in rendering judgment in their favor for the sum of the subscriptions. It was satisfactorily shown that the bond sued on was executed in consideration of the guaranty, which was of the payment of subscriptions of plaintiffs and others, and that the purpose was to refund these subscriptions in the event the road should not be built by January 1, 1890.

It was error to exclude oral evidence on the plea in abatement that Ft. Worth was the principal office of the company, but not reversible, because it appears that no injury has resulted thereby. The judgment of the court below will be affirmed as to the defendant the Red River, Sabine & Western Railway, but as to the sureties, to wit, F. W. Ball, Charles Scheuber, W. F. Lake, John Ratican, and Max Elser, said judgment will be reversed, and the cause dismissed without prejudice.

DANIEL et al. v. HUTCHESON.

(Supreme Court of Texas. June 22, 1893.)

COUNTY JUDGES — RECONSTRUCTION ACTS—JURISDICTION.

Under Act Cong. March 2, 1867, (one of the reconstruction acts,) providing that when the people of Texas should adopt a constitution containing certain requisites the powers of the military commander should become inoperative, county judges appointed by such commander

did not at once lose jurisdiction theretofore exercised, on the adoption of the constitution of 1869, referring such jurisdiction exclusively to district courts, but only after said courts had become fully organized through appropriate legislation, and the military government was at an end.

Question certified from court of civil appeals of first supreme judicial district.

Action by Annie E. Daniel and others against J. C. Hutcheson to recover land. Defendant had judgment, which was reversed by the court of civil appeals. 22 S. W. Rep. 278. Because of the dissent of one of the judges the cause is certified to the supreme court for final determination. Reversed.

F. G. Morris and W. F. Robertson, for plaintiffs. Hutcheson & Sears, for defendant.

STAYTON, C. J. The lot in controversy belonged to R. W. Doerling, who died during the year 1867, in Harris county, Tex. This action was brought by his surviving widow and children, and it was tried on an agreed statement of facts, from which it appears that Mrs. Doerling, (now Mrs. Daniel,) during the same year of her husband's death, was appointed administratrix of his estate, and qualified. On her application the county court of Harris county, in the month of February, 1870, ordered the sale of the lot in controversy to raise money to pay debts of the estate; and in pursuance of that order it was sold on April 5, 1870, and that sale was confirmed by that court. The agreement states "that the county judge appointed by Gen. Reynolds, of the army of the United States, in military command of the department, including Texas, continued to act as county judge; and the order of sale and confirmation herein referred to were made in the county court, as held by him, in said Harris county, at the dates above stated." It was further agreed: "If, at the time of said order of sale, and confirmation thereof, the said county court had jurisdiction, generally, of administrations on estates of deceased persons, or power to make such orders, then the plaintiffs have no title; but, if said court did not then have the general jurisdiction of administrations of deceased persons, then plaintiffs have title to said lot No. 28, and we submit to the court the legal question: Did the county court have jurisdiction to make orders of sale, and confirm sales, at the time said orders were made, in administrations pending in said court when the constitution of 1869 took effect?" The district court held, under the agreed facts, that the county court had jurisdiction to order and confirm the sale, and rendered a judgment in favor of the defendant. On appeal a majority of the judges of the court of civil appeals held that upon the adoption of the constitution of 1869, by a vote of the people, county courts ceased to exist; that probate jurisdiction theretofore exercised by them, under the terms of the constitution, at once vested in the district courts, who might exercise such jurisdiction without further legislation. The majority further held that the condition of the country, and the imposition of a military government on the people and territory of the state, continued until after the sale was made and confirmed, did not suspend the jurisdiction of district courts in probate matters, or continue the right of county courts to exercise such jurisdiction as, under the constitution of 1866, they were clothed with. One of the judges of that court, however, held that in so far as it affected the jurisdiction of district courts the constitution of 1869 could not become operative until the legislature should redistrict the state, and fix a time for holding courts in the several districts; that the district courts provided for by the constitution of 1869 were essentially different courts from those organized under the constitution of 1866,—the latter having no original probate jurisdiction, while the former were clothed with such probate jurisdiction as under the former constitution was possessed by county courts, as well as the power conferred on district courts by the former constitution,—and from this an inference was drawn that it was the intention of the people that the district and county courts should continue to exercise the jurisdiction conferred upon them by the constitution of 1866 until the reorganization of district courts through proper legislation under the constitution of 1869.

The cause comes before this court on certificate of dissent. The inquiry in this case is, did the county court have jurisdiction to order and confirm the sale at the time it assumed to do so? If it had, this settles the right of the parties, and an inquiry as to the time when district courts, under the constitution of 1869, acquired jurisdiction over probate matters, is not a material inquiry. In determining the question presented we do not feel authorized to look alone to the constitution of 1869, disregarding the condition of affairs existing at the time that constitution was adopted by the vote of the people, and the subsequent condition, for in our opinion those are matters that must be considered in determining the power of the county court for Harris county at the time it ordered and confirmed the sale in question. A brief statement of facts will be necessary to a proper understanding of the condition of affairs existing prior to and at the time those orders were made:

The Civil War, in fact, ended in May, 1865, if by "war" be meant "a contest between states, or parts of states, carried on by force;" but at its close military possession was taken, and a provisional governor was appointed by the president of the United States, by whom state, district, and county officers were appointed. A constitutional convention was called, which convened on February 7, 1866, and so amended the constitution of the state as to meet the changed condition of affairs brought about by the result of the war, and amendments to the constitution of the United States. Those amendments were ratified by the people. One of those amendments increased the number of judges of the supreme court, and made

them elective by the people, as were all other judges. Another created county courts, with jurisdiction such as county courts did not have under the former constitution, but still conferring on them the probate jurisdiction theretofore possessed. All officers provided for by that constitution were elected, and entered upon the discharge of their respective duties. The legislature met, and passed laws, and the state government was again administered by officers holding under the terms of the constitution. All the courts were held by judges elected as the constitution prescribed, and county and municipal officers, selected in the same manner, were in the discharge of their duties. On August 20, 1866, the president of the United States decided that the war had ended in Texas, and so proclaimed; but on March 2, 1867, congress passed what has been known as the first of the "reconstruction laws." Those declared that no legal state government existed in Texas, and in other states named; divided the southern states into military districts, made subject to the military authority of the United States, and directed that an officer of the army, not below a named rank, should be assigned to command in each district; and it was declared that "all interference, under color of state authority, with the exercise of military authority under this act, shall be null and void." The act further provided that it should become inoperative in each state when the people should adopt constitutions containing requisites mentioned, and should also adopt the fourteenth amendment, and it became a part of the constitution of the United States, provided the state was admitted to representation in both houses of congress. The law further provided "that until the people of said rebel states shall be, by law, admitted to representation in the congress of the United States, any civil government which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same." A military officer was appointed in each district, and in Texas this officer exercised powers legislative and executive, if not judicial. Officers elected under the constitution were removed from office, and others appointed in their places; but some question having been made of the power of the commandants in each district to do this, on July 19, 1867, congress passed another law, in part explanatory of the act before referred to, and of an intervening act, in which it was declared "to have been the true intent and meaning of [the acts before referred to] that governments then existing in the rebel states, [naming them,] were not legal state governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of congress." The act last referred to further conferred upon the commander of any district, subject to the approval of the general of the army of the United States, the power to remove from office any person holding or exercising any office, civil or military, claimed or held under any state, or the government thereof, or any municipal or other division thereof, and to supply his place by some officer or soldier of the army, or by the appointment of some other person. The same power was granted to the general of the army of the United States, and acts of officers in removing civil officers before the passage of the last act were confirmed. The act further provided "that no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States." On July 30, 1867, the governor of the state, elected under the constitution as amended in 1866, was removed from office, and a provisional governor was appointed, who held office until September 30, 1869, when he resigned; and from that time until January 8, 1870, the executive duties were performed by an adjutant of the general in command, placed in charge of civil affairs. On June 1, 1868, a convention assembled to frame a constitution for the state in pursuance of the act of congress, and that body, with the assistance of the commanding general, succeeded in putting in form that which subsequently became the constitution of 1869. By the ordinance of the convention this draft of a constitution was to be submitted to the vote of the people on the first Monday in July, 1869; but by proclamation of the president the election was postponed until November 30, 1869, and on that and the three succeeding days the election was held, and that constitution adopted. At the same election at which the constitution was adopted, all the officers made elective by the constitution were elected in accordance with the act of congress empowering the president to direct the election to be held. The governor and legislature were elected, and the latter met on February 25, 1870, and ratified the amendments to the constitution of the United States, and elected United States senators, when it adjourned until April 26th of same year. The governor elect did not qualify as governor until April 28, 1870, but on January 8th, preceding, he was appointed provisional governor by the officer in command of the district. On March 30, 1870, the act admitting the state to representation in congress was approved, and on the next day senators and congressmen elected at the election begun on November 30, 1869, took the oath of office. The constitution of 1866 made the supreme court to consist of five judges, elective by the people, while the constitution of 1869 made the court to consist of only three judges, to be appointed by the governor; but the judges appointed by the military authorities continued to act until the December term, 1870, when began the services of those appointed under the constitution of 1869. No appointments of district judges were made, under the constitution of 1869, prior to July, 1870, and the judges of those courts, appointed by the military authorities, continued to act. From the time the constitution of 1869 was adopted by a vote of the people until the reorgan-

ization of the state government under that constitution, district courts exercised only such jurisdiction as was conferred on them by the constitution of 1866, and many of them did not exercise probate jurisdiction until the autumn of 1870. Judges of county courts appointed by the military authorities continued to hold office and to exercise the probate jurisdiction conferred on those courts by the constitution of 1866, until after the reorganization of the state government under the constitution of 1869. Although the state was admitted to be entitled to representation in congress on March 30, 1870, not until April 16th, following, was military rule relinquished. On that day, by general order No. 74, the military commander declared that the state had resumed her practical relations to the general government, and that all authority conferred upon him by the reconstruction laws was remitted to the civil authorities; but that order declared that "all civil officers will continue in the discharge of their present duties until relieved by qualified successors," and it directed that "the supreme and district courts of the state will continue in the discharge of their respective duties until the new courts shall be inaugurated." This order was recognized by the legislature which assembled on April 26, 1870. Joint Resolution, approved Aug. 15, 1870.

From this statement it will be seen that military government, under the reconstruction laws, continued to exist in the state until April 16, 1870, and, in effect, to some extent, even after that date. Prior to that date, however, the facts transpired on which the rights of the parties depend. Whether civil government for so long a period, and to such extent, was wisely, or even lawfully, superseded, is now an irrelevant inquiry, for in deciding private rights we must look to the facts then existing. That the state was governed by military law, even though its own laws may to some extent have been recognized and administered, must be considered an established fact. The power of the United States government to impose such a rule upon the state must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty, having no relation to the United States than that usually sustained by one independent nation to another. Civil war had existed, of magnitude seldom exceeded, resulting in the overthrow, by force of arms, of the cause the state had espoused, and the occupation of her territory by a hostile army. This occupancy was continued, and, under the laws of war, furnished ground for the establishment of military law. This was done under the express requirement of acts of congress. The power of the United States government during the war, in territory of which they had military possession, is thus stated: "Although the city of New Orleans was conquered, and taken possession of, in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the national government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country, and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers, and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use, or otherwise. It may do anything necessary to strengthen itself, and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war." New Orleans v. Steamship Co., 20 Wall. 393. This language, strong as it may seem, asserts a rule of international law recognized as applicable during a state of war; and it was used in considering the power of a mayor of the city of New Orleans, appointed by the military authorities of the United States during the occupancy of that city, in 1865, to make a lease for a term of years of a water-front property belonging to the city.

Reference to some cases will be made for the purpose of illustrating the extent to which such powers have been exercised and the binding effect given to them, in so far as they operated on private right. In 1862, while the United States troops occupied New Orleans, the president, by proclamation, created a provisional court for the state of Louisiana, with authority, among other powers, to hear, try, and determine admiralty causes. By that court a decree was rendered against the vessel that gives style to the cause, and subsequently a question arose as to the validity of the court. The supreme court of the United States, after stating that the Civil War was attended by the general incidents of a regular war, pointed out the objects to be obtained, and said: "But in the attainment of those ends, through military force, it became the duty of the national government, whenever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice. The duty of the national government in this respect was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the president, as commander in chief, and intrusted, as such, with the direction of the military force by which occupation was held." It was held that the court was properly established by the president, in the exercise of lawful power existing during the war. The Grapeshot, 9 Wall. 132. The same court rendered a judgment for money against a defendant, under which his plantation was sold, and the title of the purchaser was sustained by the supreme court of the United States. Burke v. Miltenberger, 19 Wall. 524; Lewis

v. Cocks, 23 Wall. 469. In that case the supreme court again considered the nature of the power exercised by the president, and the validity of the court. Still another court was established in New Orleans, during the war, by the general commanding the United States army then occupying the city; and that court rendered a very large judgment against a defendant who subsequently questioned its jurisdiction, and sought relief from its judgment. The matter went before the supreme court of the United States on writ of error, and that court sustained the jurisdiction of the court. In the course of the opinion it was said, after referring to several decisions: "In view of these decisions it is not to be questioned that the constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the Civil War in conquered portions of the insurgent states. The establishment of such courts is but the exercise of the ordinary rights of conquest." Mechanics' Bank v. Union Bank, 22 Wall. 276; Id., 25 La. Ann. 387. The case of Pennywitt v. Eaton, 15 Wall. 382, involved the same general question, and was decided in the same way. After the United States, in 1846, had military possession of upper California, the military and naval commanders were instructed to establish a civil and military government within the conquered territory. This was done, and duties were imposed and collected for the support of the government. Those acts were held to be the lawful exercise of an belligerent right over conquered territory. Cross v. Harrison, 16 How. 164. The same course was pursued when possession of New Mexico was held by the military authorities of the United States, in 1846. A judicial system, composed of appellate and courts of original jurisdiction, was created, judges were appointed, and districts or circuits established; and this was held to be only the exercise of legitimate military power. Leitensdorfer v. Webb, 20 How. 176. The following cases illustrate the general question involved in this case: Fleming v. Page, 9 How. 614; Jecker v. Montgomery, 13 How. 515; U. S. v. Rice, 4 Wheat. 253; Coleman v. Tennessee, 97 U. S. 517; Ex parte Milligan, 4 Wall. 141; Burke v. Tregre, 22 La. Ann. 69; Hefferman v. Porter, 6 Cold. 391; Scott v. Billgerry, 40 Miss. 119; Chase's Dec. 133; Lanfear v. Mestier, 18 La. Ann. 497.

Mr. Halleck makes a very full and clear statement of the powers which may be exercised by a government holding military possession of territory of a hostile state. Hal. Laws War, 775-809. Conceding the broken relation of Texas to the United States during the war, the supreme court held "that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred." Texas v. White, 7 Wall. 726. But in view of this fact the reconstruction laws were maintained, and the necessity for them declared, by congress, in order to restore this broken relation under the changed conditions existing. Under the facts existing it was not for the people of Texas to determine when military rule should cease, or to what extent the administration of essentially civil affairs should be controlled by military power. These were questions for the decision of the dominant power, holding military possession, and, whether decided correctly or not, that decision cannot now be questioned. Where private rights are concerned the courts must look to facts as they existed, and not to theories. The condition of affairs, and the power of the military government, as exercised and understood to exist during the period referred to, is truly set forth in some of the opinions of the judges of the supreme court in this state, holding under military appointment. In Ex parte Warren, 31 Tex. 144, it is said: "Our present state government is provisional, only, in its character, and subject in all respects to the paramount authority of the United States. Being thus 'subject,' and the act above referred to having been given us as a rule of action by the commander of the fifth military district, it would seem that there is no reason left for doubt." In another case, speaking of the power of a military governor, it was said "that whatever he declared was, for the time being, law, being prescribed by the supreme power in the state. * * * The orders issued by the commander of the fifth military district show that they exercised legislative power, and that this power was as full, ample, and complete as if it were exercised by a senate and house of representatives. The power exists, but the exercise of this power is by a different body, but still it is exercised by the supreme power in the state. * * * This political power is not of a few months' duration, biennially, but, like the executive, continuous, and always accessible." McClelland v. Shelby Co., 32 Tex. 20, 21. The judges of the supreme court appointed in July, 1870, by the governor of the state, elected by the people, while conceding that the courts then existing owed their existence to laws enacted by the people, seem to have been of the opinion that all officers then acting in the state derived their powers solely from the acts of congress before referred to, for it was said by that court: "We have no officer in any department of our present government chosen under the constitution of 1869. The governor, lieutenant governor, heads of departments, members of the legislature, and local officers, all owe their official existence to the laws of congress before referred to. * * * We have elected no legislature, no governor, no officer of any kind, under it; but under the reconstruction acts we elected all these officers, expecting them to go forward, and, by necessary legislation, organize a government under it, [constitution of 1869,] and under the constitution, laws, and treaties of the United States." Grant v. Chambers, 34 Tex. 584. It was again stated by the same court that they judicially knew that in 1869 "the government of the state of Texas was administered under the reconstruction laws, by the military authority, and that the orders from time to time issued by the mili-

tary commander of the fifth district had the force and validity of law." Gates v. Johnson Co., 36 Tex. 146. We refer to those cases for the purpose of showing what was the practical construction given to the reconstruction acts, to the power of officers acting under them, and of the powers which were exercised by reason of the military occupancy of the country. Although during the period of reconstruction there were a supreme court, district courts, and county courts, all exercising jurisdiction such as the constitution of 1866 conferred on courts thus designated, still they were not organized and officered as that constitution, or any other law made by the people of Texas, required them to be, but through the exercise of the military power then dominant; and, as have seen, this was exercised without restriction until April 16, 1870, and made to operate, in some respects, for a period extending until the last month of that year. That the municipal laws of the state, in the main, were permitted to be enforced in those tribunals, in the determination of private rights, does not affect their character, nor make them other than provisional courts, acting under the authority of the United States, which had power to, and in fact did, continue them in existence even after the time the state was permitted to have representation in congress.

It is contended here that when the constitution of 1869 was adopted by the people it became the sole law determining what courts should exist, and what jurisdiction they should each exercise, and that as that instrument became operative early in December, 1869, when adopted by the vote of the people, and provided that probate jurisdiction should be exercised by district courts, and not, as theretofore, by county courts, all power of the latter court to exercise probate jurisdiction ceased. In Peak v. Swindle, 68 Tex. 250, 4 S. W. Rep. 478, it was held that the constitution became operative in all its parts from the time it was ratified by the people. It was not, however, decided that, except in so far as it assumed to regulate private rights, it was not in subordination to any other law. The question in that case was as to the time statutes of limitation ran. In the course of the opinion it was said "that congress deemed the condition of the country such, at the time the constitution was adopted, as to require continuance for a period thereafter of a provisional government, and to deny to the state a representation in congress until it was satisfied that the constitution was in harmony with that of the United States, and that the time had come when the provisional government should be withdrawn, is a matter of no consequence, in the consideration of the question before us. Subject to the constitution of the United States, laws made in pursuance thereof, and treaties made under the authority of the general government, the constitution under consideration became the supreme law of this state, regulating, so far as it assumed to do so, the rights of persons and property, from the date of its adoption by the people." The constitution of 1869 was framed and adopted in pursuance of the acts of congress looking to the restoration of that relation which had, before the war, existed between the United States and the state, and was as valid and binding a law, in so far as it purported to affect private rights, as were laws already existing, and enforced through the military government. That it might have been annulled so long as military rule continued did not affect its force as a law regulating private rights, any more than did the power to have annulled laws already existing affect their validity and force when not annulled. The United States had the power to determine when the political relations formerly existing should be restored, and when the provisional government should cease, and the several departments of the state government become operative under the constitution. Occasion for the reconstruction acts grew out of the difference of opinion between the president and congress, of their respective rights and power to declare when the state of war ceased, and when military government in the southern states should end. The president proclaimed the war to be at an end in Louisiana and some other states on April 2, 1866, and a like proclamation was made as to Texas on August 20th of same year. Congress, dissenting from this view, assumed the right to determine when a state of war should be deemed at an end in the several states theretofore in arms, and, looking to the longer continuance of military government in each of them, the several acts of congress before referred to were passed. The substance of those acts, in so far as necessary to be stated, has already been given. The military commanders required by those acts to be appointed were, in effect, the government, until the reorganization of the state government, in 1870; and, as before seen, some of their orders continued to operate for a much longer period. As before stated, these military commanders, and their appointees, were relieved from obligation to govern their actions by the opinion of any civil officer of the United States, and they fully exercised all the powers conferred upon them by the law. The military government, as before stated, was not proclaimed to be at an end until April 16, 1870, before which time all the acts transpired on which defendants rely for title. Notwithstanding the act of congress which looked to the termination of this government, when the state was admitted to representation in congress, in fact it continued in this state for some time after that occurred; and the earliest period at which it can be claimed that county courts ceased to have probate jurisdiction is the period at which the state government was in operation under the constitution of 1869. In the case of Burke v. Miltenberger it was claimed that the provisional court established in New Orleans was ipso facto dissolved by the president's proclamation of April 2, 1866, declaring the war to be at an end in Louisiana. It was said that, while the proclamation authorized the dissolution of the court, "it is plain to be seen that its dissolution without proper pro-

vision for the business before it, as well as that which had been disposed of, would have produced serious injury; and this state of things, requiring the action of congress, was doubtless recognized by the president, as nothing is said in the proclamation about this court. If it was subject to be dissolved as soon as the proclamation appeared, and was no longer a court de jure, it still had a de facto existence until its actual dissolution."

It is claimed that, while there may be a de facto officer, there can be neither a de facto court nor a de facto office. The opinion last noticed decides to the contrary. When, under the order of the president, courts were organized within the territory of states held by military force, or when, under like circumstances, they were organized under the reconstruction acts, it must be held that such courts were de jure. If continued in existence beyond the time the laws of war would sanction, or the acts of congress justify, in the determination of private rights dependent upon and growing out of their action, the plainest principles of justice require that they should be deemed de facto, and their judgments or decrees binding. In Hildrith's Heirs v. McIntire's Devisees, 1 J. J. Marsh. 208, the rule, and reason for the rule, are thus fairly stated: "When the government is entirely revolutionized, and all its departments usurped by force, or the voice of the majority, then prudence recommends, and necessity enforces, obedience to the authority of those who may act as the public functionaries; and in such a case the acts of a de facto executive, a de facto judiciary, and of a de facto legislature, must be recognized as valid. But this is required by political necessity. There is no government in action, excepting the government de facto, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others, who, sustained by a power above the forms of law, claim to act, and do act, in their stead." In Trevino v. Fernandez, 13 Tex. 630, it was held that a decree of a Mexican court, if final in its nature, vesting title in a party before it to a tract of land on this side of the Rio Grande, within the limits of the state of Texas, as defined by political authorities, must be respected, if, in fact, that government was in hostile possession of the territory in which the land was up to and at the date of the decree. After noticing several authorities this court said: "From these authorities it is manifest that the acts of the government in actual possession, in the ordinary administration of its laws, so far as they affect private right, are valid, and can be set up to support an action, or defend a right. Those affecting public rights are void, and cannot be enforced." In Keene v. McDonough, 8 Pet. 308, it appeared that a party claimed a tract of land under a sale made under a decree of a Spanish court after the territory embracing the land had been ceded by Spain to the United States, but before actual possession was taken by the latter government. It was held that "the adjudication having been made by a Spanish tribunal after the cession of the country to the United States does not make it void, for we know, historically, that the actual possession of the terrtiory was not surrendered until some time after those proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was de facto in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid." These cases seem to illustrate a rule which should be held of universal application in the determination of private right. Holding, as we do, that the county court had jurisdiction to order and confirm the sale of the lot, the judgment of the court of civil appeals will be reversed, and the judgment of the district court affirmed. It is so ordered.

McDONALD et al. v. INTERNATIONAL & G. N. RY. CO.

(Supreme Court of Texas. June 15, 1893.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DEGREES OF NEGLIGENCE — FAILURE TO SIGNAL — SPEED OF TRAIN — GOING ON TRACK IN PLAIN VIEW OF APPROACHING ENGINE — INSTRUCTIONS.

1. In an action against a railroad company for the death of plaintiff's husband, who stepped at night in front of an engine having a bright headlight, near defendant's depot, while the train was running at a high rate of speed, it is not error to charge that "the running by defendant of trains upon its track was authorized by law, and the law did not impose any rule as to the rate of speed of such trains;" since such charge means no more than that it is not negligence per se to run a train at any particular rate of speed. 20 S. W. Rep. 847, reversed.

2. Such instruction is not open to the objection that it is on the weight of the evidence.

3. It is not error to refuse to charge that, if it was the duty of the persons operating the trains "to slow up the speed of said train as it approached the point where" deceased was killed, then, in considering the question of deceased's contributory negligence, the jury are instructed that he "had a right to believe that the train would be slowed up, and to act on such belief, unless, from the conduct of such employes, it was apparent to him that the speed of the train would not be slackened," since such charge is argumentative.

4. Where deceased knew the train was approaching, it is not error to charge that it was the duty of defendant's servants, on approaching a crossing, to ring the bell or blow the whistle, but that the failure to do so would not relieve the person in danger from the duty of using his senses, and, if such person was aware of the presence of the train, the failure to ring the bell or blow the whistle would be immaterial; since such failure was not the cause of the accident. 20 S. W. Rep. 847, reversed.

5. The court charged that "negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person, under the existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion." *Held*, that such instruction was not objectionable in that it made the question of deceased's negligence depend on the circumstances as they were disclosed on the trial, instead of the circumstances as they at the time appeared to him.